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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

BILLY J. CONLEY,
Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTION PRESENTED FOR REVIEW

Did the state court in a FELA action permit the congressionally abolished doctrine of assumption of the risk to be charged in the guise of contributory negligence?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

OPINIONS BELOW

Petitioner was awarded damages by the Circuit Court of Jackson County, Missouri, in his Federal Employers Liability Act claim. On appeal by petition to the Missouri Court of Appeals, the judgment was affirmed in an opinion filed November 29, 1988 (Appendix at 2). Petitioner's Application to Transfer the cause to the Supreme Court of Missouri was denied on March 14, 1989 (Appendix at 1).

JURISDICTION

The decision of the Supreme Court of Missouri denying the Petitioner's Application to Transfer was filed on March 14, 1989. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Employers Liability Act, 45 *U.S.C.* §§ 51 et seq., provide as follows:
45 *U.S.C.* § 53. *Contributory negligence; diminution of damages*:

> In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 *U.S.C.* § 54. *Assumption of risks of employment*

> In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have as-

sumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to to the injury or death of such employee.

STATEMENT OF THE CASE

On November 17, 1979, Petitioner Billy J. Conley, in the course of his employment as a special agent for Respondent Burlington Northern Railroad, injured his ankle when descending from a boxcar. Petitioner stepped into a hole and onto a brake shoe; as his foot landed on the edge of the brake shoe, the brake shoe gave way and Petitioner turned his ankle. Petitioner reported the injury to his supervisor and went home. The company doctor examined Petitioner and referred him to an orthopedist, Dr. Gottsch. Petitioner did not return to work, pursuant to the recommendation of Dr. Gottsch.

In a telephone conversation a few days later, Petitioner's supervisor told Petitioner that if he did not return to work immediately he would be fired. On November 23, 1979, Petitioner returned to Dr. Gottsch and obtained a letter from him which released Petitioner to return to work but directed limitation of his standing and walking. Dr. Gottsch sensed that there was pressure on Petitioner to return to work. Petitioner returned to work, delivering Dr. Gottsch's letter directly to his supervisor. Petitioner performed light duty work for three days, then resumed his regular work duties at his supervisor's direction, although he had not received from the doctor a release from the activity limitations and his ankle remained painful. The average amount of time that the limitations on standing and walking would have remained in effect for the ankle to heal was six weeks.

During the period of time from his return to work until his employment with the railroad ended, Petitioner did not tell his supervisor that because of the pain in his ankle he could not continue to perform his regular work duties, because he could and did continue to perform them, but the painful condition of Petitioner's ankle was known to his supervisors, as well as other officials of Respondent Burlington Northern.

Even though the company policy was that an employee was required to be completely physically able to do his job before returning to his work duties, at no time prior to August, 1982 was Petitioner directed or advised by his supervisor or any other company official or the company doctor to return for a reexamination of his ankle condition. Petitioner did not do this on his own because it had been made clear to him that if he did not work, he would be fired. Petitioner did not know that he would sustain serious and permanent injury by continuing to work.

Petitioner again twisted his ankle at work in August, 1982, and the condition of his ankle thereafter deteriorated further. This was discussed with his supervisor, but Petitioner was nonetheless assigned to his regular duty. Because of his not being 100 percent physically able to perform his duties as required by Respondent, Petitioner's employment ended in January, 1983. Petitioner was diagnosed in November, 1984 as having reflex sympathetic nerve dystrophy in his left ankle and foot; he will never regain the ability to use his ankle, foot and leg in a normal fashion. The percentage of his disability is 100 percent.

Respondent brought an action under the Federal Employers Liability Act, 45 *U.S.C.* §§ 51 et seq., in Missouri state court. Following the trial the Missouri Court of

Appeals reversed and remanded the case for a new trial based on prejudicial error in the submission of the contributory negligence instruction. *See Conley v. Burlington Northern Railroad,* 712 S.W.2d 381 (Mo. Ct. App. 1986). On retrial, the jury found in favor of Petitioner on his claim against Respondent. Petitioner's claim was not for the initial injury to his ankle on November 17, 1979, but the aggravation of that injury and the reinjury to the ankle sustained as a result of Respondent's insistence that Petitioner be assigned to his regular duties. The jury further found that Petitioner was 60% at fault. The court on retrial had given the following instruction on contributory negligence: "In your verdict you must assess a percentage of fault to plaintiff, whether or not defendant was partly at fault, if you believe: First, plaintiff failed to report to defendant that his work assignments were causing pain in his ankle, and Second, plaintiff was thereby negligent, and Third, such negligence of plaintiff directly contributed to cause his injury."

On appeal, the Missouri Court of Appeals on November 29, 1988 rejected Petitioner's claim that the trial court erred in allowing the jury to find contributory negligence based on Petitioner's failure to report that work assignments were causing pain in his ankle. The Missouri Supreme Court on March 14, 1989 denied Petitioner's Application for Transfer.

ARGUMENT

In a FELA Action Based on the Employer's Negligence in Assigning Work for Which the Employee Was Not Medically Fit, the Court Erred by Allowing the Jury to Find Contributory Negligence Based Upon the Employee's Alleged Failure to Report His Pain to His Superiors, Since This Was a Disguised Presentation of the Abolished Assumption of the Risk Defense.

Justice Brennan, writing in *Rogers v. Missouri Pacific Railroad,* 352 U.S. 500, *reh'g denied,* 353 U.S. 943 (1957), noted that the Supreme Court is vigilant to exercise its power of review in FELA cases, and is obligated to effectuate the Congressional intent behind the FELA by granting certiorari to correct instances of improper administration of the act and to prevent its erosion by narrow and niggardly construction. 352 U.S. at 509. It is clear that the statutory bar against the assumption of the risk doctrine under the FELA was eroded here.

The defense of assumption of the risk is not available in any case arising under the FELA for the recovery of damages for injuries resulting from an employer's negligence. *Tiller v. Atlantic Coast Line Railroad,* 318 U.S. 54 (1943); 43 *U.S.C.* § 54. The courts have been vigilant to thwart attempts to circumvent this rule. By characterizing assumption of risk as contributory negligence, a defense which is available to reduce the amount of damages under the FELA, *see* 45 *U.S.C.* § 53, an employer may reduce its liability to an injured employee merely because the employee faced the risks inherent to the job. This is precisely the situation in the instant case.

In *Schlemmer v. Buffalo, Rochester & Pittsburg Railway,* 205 U.S. 1 (1907), this Court had before it the first attempt in an FELA case to characterize assumption of the risk as contributory negligence. The Act of March 2, 1893, ch. 196, 27 stat. 531, required the use of automatic couplers. Section 8 of that Act provided that any employee injured by any car in use contrary to the provisions of the Act would not be deemed to have assumed the risk thereby created. Plaintiff's decedent was killed when he was compelled to go between cars not equipped with automatic couplers. The lower court nonsuited plaintiff on the ground of contributory negligence. The Pennsylvania Supreme Court affirmed. In reversing, Mr. Justice Holmes said, speaking of assumption of risk:

> It [assumption of risk] is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like § 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.
>
> Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under

> the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. * * * But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master . . . then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name.

Schlemmer v. Buffalo, Rochester & Pittsburg Railway, supra, 205 U.S. at 12-13. When that case again reached the Supreme Court, in *Schlemmer v. Buffalo, Rochester & Pittsburg Railway,* 220 U.S. 590, 595-96 (1911), the Court said:

> While, as was said in the case when here before, assumption of risk sometimes shades into negligence as commonly understood, there is, nevertheless, a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. . . .
>
> Contributory negligence on the other hand, is the omission of the employee to use those precau-

> tions for his own safety which ordinary prudence requires.

(Citation omitted.) The basic principles concerning contributory negligence and assumption of the risk in FELA cases have remained the same. Most recently, in *Taylor v. Burlington Northern Railway,* 787 F.2d 1309 (9th Cir. 1986), a railroad employee brought a FELA action alleging that harassment by a railroad foreman caused the employee to suffer paranoid schizophrenia. The Ninth Circuit held that the employee's failure to "bid off" the section gang he worked on, and thereby escape a hostile and abrasive supervisor, was an "assumption of the risk" of emotional injury from the supervisor's hostility, abuse and harassment, and not contributory negligence. The trial court was held not to be in error in excluding the railroad's intended testimony on the subject:

> Defenses once embraced substantially within the concept of assumption of risk are barred under the FELA and may not be revived in the form of contributory negligence. Where an act of alleged contributory negligence is but the practical counterpart of assumption of risk, it does not constitute a defense. . . . By this reasoning, the employer's argument here must fail, for it is in essence an assumption of risk defense, not one based upon contributory negligence. The employee who enters the workplace for a routine assignment in compliance with the orders and directions of his employer or its supervising agents, who by such entry incurs risks not extraordinary in scope, is not contributorily negligent, but rather is engaging in an assumption of risk.

> Here the employee simply reported to work under the person assigned; and though the supervisor was known to have a hostile disregard for the employee, it was not such an extraordinary situation that the employee is chargeable for refusing to demand other terms and conditions of supervision. His acts did not constitute contributory negligence under the FELA. Reporting to work or facing the risks inherent in one's job is the essence of assumption of risk, . . . though the failure to quit a job or to transfer to a different assignment might not constitute an assumption of the risk in a degree sufficient to bar recovery.

Id. at 1316-17 (citations omitted).

The court distinguished contributory negligence on the basis that it constituted careless acts or omissions tending to add *new dangers* to conditions the employer negligently created or permitted to exist. *Id.* at 1316.

A close examination of the facts in the instant case demonstrates that the invocation of contributory negligence was a subterfuge. The alleged failure of the Petitioner to report his ankle pain to his supervisor is clearly a defense embraced substantially within the doctrine of assumption of risk. Petitioner received medical treatment and resumed his regular work duties on orders from his supervisors; if he did not work, he would be fired. Petitioner's acceptance of the conditions of his employment, including the pain in his ankle as he continued to perform his regular work duties, added *no new danger* to the conditions that his employer permitted to exist, and was clearly not contributory negligence. The issue at stake here was eloquently stated

by the federal district court in *Munna v. Reading Co.*, 247 F. Supp. 252 (E.D. Pa. 1965), a FELA case:

> We think that plaintiff's conduct here, which consisted only of doing his normal work despite a potentially dangerous situation arising from defendant's negligence, was nothing more than classic assumption of risk, that is, mere "* * voluntary exposure to an obvious or known danger which negates liability. * * *" To hold otherwise would be to thwart the purpose of the 1939 Amendment, and would permit the doctrine of assumption of risk to throw aside its Congressionally given shroud and walk the earth again in the clothing of contributory negligence. . . . This the obvious Congressional intent will not permit.

Id. at 258 (citation and footnote omitted).

It is thus important that the Court grant this Petition for a Writ of Certiorari to ensure that the obvious Congressional intent is given effect.

CONCLUSION

For the foregoing reasons, the Petitioner, Billy J. Conley, respectfully requests this Court to grant his petition and issue a Writ of Certiorari to the Missouri Supreme Court.

Respectfully submitted,

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APPENDIX

(Dated March 14, 1989)

No. 71383
WD 39857

IN THE SUPREME COURT OF MISSOURI
January Session, 1989

Billy J. Conley,
Appellant,

vs. TRANSFER

Burlington Northern Railroad Co.,
Respondent.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

CONVINGTON, J., NOT PARTICIPATING

STATE OF MISSOURI-SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1989, and on the 14th day of March 1989, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of March, 1989.

.....

Clerk.

..... D.C.

(Filed November 29, 1988)

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 39857

BILLY J. CONLEY,
Appellant,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

Opinion Filed: November 29, 1988

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

Honorable Tom J. Helms, Judge

Before Kennedy, C.J., P.J., Turnage and Berrey, JJ.

Plaintiff Billy J. Conley appeals from a judgment of the trial court by which he was awarded $200,000 damages in a Federal Employers Liability Act claim against his employer Burlington Northern. His injuries consisted of aggravation of an earlier ankle sprain, the aggravation resulting from defendant's alleged negligence in (quoting from his verdict-directing information) "assign(ing) plaintiff to work which defendant in the exercise of ordinary care should have known would aggravate plaintiff's ankle condition".

Conley claims that the trial court erred in submitting to the jury his contributory negligence in "fail(ing) to

report to defendant that his work assignments were causing pain in his ankle".

The facts:

Plaintiff while going about his work as a special agent for the railroad on November 17, 1979, twisted his ankle. This injury is not the basis of the lawsuit; the lawsuit is based upon the subsequent aggravation of this injury by the railroad's work demands upon him. Plaintiff's regular work of surveillance of railroad equipment and cargo called for him to walk about the railroad yards, often on rough and uneven surfaces, and to climb on to railroad cars. He was on the night shift at least a part of the time in question. His evidence was that the ankle was causing him pain as he performed the duties of his employment; that he complained of this to his superiors; that he limped; and that his superiors knew of his ankle injury and pain; and yet it required him to continue working. We do not need to examine this evidence in detail, for the railroad has not appealed and there is no issue of the railroad's negligence in the particulars submitted. (Of course, the railroad by failing to appeal does not admit its negligence, but only that the evidence made out a prima facie case of negligence on its part.)

Plaintiff says the evidence did not justify the submission of his contributory negligence because there was no evidence that he knew or should have known that continued work on the injured ankle when it was hurting would cause substantial harm. Plaintiff points out that no physician had ever told him of this danger and that he should not be charged with this knowledge as a layman without medical knowledge. Without that knowledge, he argues, his continued working without reporting

the pain was not negligence on his part. For this position, he cites our opinion in an earlier appeal of this case, Conley v. Burlington Northern Railroad Company, 712 S.W.2d 381 (Mo. App. 1986).

We hold, however, that it was not necessary for plaintiff, in order to be found guilty of contributory negligence, to have received advice from a physician that his continued work on the injured ankle could result in the degree of disability which ultimately resulted. A layman is held to know what the experiences of daily life teach and that which is commonly understood and believed. The jury could believe that plaintiff knew or should have known that he was risking some damage to his sprained ankle by continuing to work upon the painful ankle, and that his failure to report the pain was negligence on his part—even though, as was no doubt the case, he did not realize the extent of the disability which might result, or (to use the language of his brief) he "did not know and appreciate the gravity of the consequences."

In the first *Conley v. Burlington Northern Railroad Company, supra,* the court had before it a contributory negligence instruction which required a finding that plaintiff "knew or by using ordinary care should have known his performance of his regular duties was reasonably likely to cause him substantial harm but continued to perform such duties." This submission was held to be unsupported by the evidence in that plaintiff a layman could not be held to "have the medical knowledge to realize that his continued work might cause him substantial harm." 712 S.W.2d at 385. It is to be noted that the contributory negligence instruction in the present case does not require a finding by the jury that

defendant knew or should have known that substantial harm was likely to result from his continued performance of his duties. It required findings only that plaintiff failed to report the pain to his superiors, that this failure so to report was negligence on his part, and that it contributed in some measure to his injury.

The *degree* of plaintiff's negligence depends to some extent upon his knowledge of the risk—upon what he knew as to the possible extent of the aggravation of the ankle injury, and the likelihood of a serious and permanent disability. The more he knew, the greater his negligence in not taking steps for his own protection. The less he knew, the smaller his negligence. This is one of those things the jury must weigh in determining the contributory negligence of plaintiff, if any. "The question of how much of the injury is attributable to the employee's own actions and lack of due care for his own condition is to be decided by the jury if there is any evidence at all of contributory negligence." Taylor v. Burlington Northern R. Co., 787 F.2d 1309, 1314 (9th Cir. 1986). "An employee is contributorily negligent when he fails to use those precautions for his own safety which ordinary prudence requires. . . . [I]f negligence on the part of plaintiff contributed in any way to causing his injury, a submissible jury case of mitigating negligence is made." White v. St. Louis-San Francisco Ry. Co., 539 S.W.2d 565, 570 (Mo. App. 1976).

Plaintiff then says that there was no evidence of the hypothesized fact that plaintiff failed to advise defendant that his work assignments were causing pain in his ankle. He also says that, if there was evidence that he did not so advise the defendant railroad, still there was no evidence that his failure so to report caused

the disability he complains of. He argues that the evidence shows that his employer knew, without his telling them, of the pain caused by his work, and that there is no evidence that his reporting the pain would have made any difference in its work demands upon him.

In determining whether an instruction is supported by the evidence, we of course take the evidence most favorable to such instruction, and ignore all evidence contrary to the hypotheses of the instruction. Woten v. Day, 684 S.W.2d 901, 902 (Mo. App. 1985).

There was testimony that plaintiff failed to advise defendant that his work assignments were causing pain in his ankle; that his superiors did not know of the ankle pain caused by his work; and that if Conley had told them of the difficulties he was experiencing in working on the ankle, that they would have relieved him of his duties. That testimony was as follows:

From the time of Conley's initial injury November 17, 1979, until the termination of his employment in early January, 1983, Conley had two successive supervisors. At the time of the injury and until March 1, 1981, his supervisor was Clifford Paul Frederick. According to Frederick's testimony, Conley was off work from November 17 until November 23, then was placed on light or limited duty for a short time in accordance with a doctor's instructions, and then was returned to his regular duty. Frederick testified: "And he assured me that he was ready to work when he was put back in rotation". Frederick testified that Conley did not limp, and he at no time complained of ankle pain. Frederick testified that Conley would not have been put back to work if he had given any indication that his ankle was causing him difficulty, and he would have been sent to a doctor.

Frederick retired March 1, 1981, and was succeeded as Conley's supervisor by Marshall Whitecotton. Whitecotton testified that he never saw Conley limp and he had no indication of his ankle difficulty until August 5, 1982. At that time Whitecotton apparently noticed Conley's limp. Conley explained to Whitecotton that it was from the earlier injury. Whitecotton then told Conley to see a doctor. Conley consulted Dr. Gottsch, an orthopedist who had examined him at the time of the original injury. Gottsch recommended that Conley support the injured ankle by means of an elastic bandage and high-top shoes. Whitecotton's interpretation of this medical advice was apparently that Conley could continue the performance of his normal duties with this support and Conley did so continue, without complaint and without limping until the latter part of December. In the latter part of December, 1982, Whitecotton laid off Conley temporarily when Conley reported to him he was taking a certain prescription medicine, which Whitecotton determined caused drowsiness. Conley missed some work at this time, but returned to work briefly. Then, early in January, 1983, his employment came to an end, whether by dismissal or by voluntary resignation the record does not show. Whitecotton like Frederick testified that he would not have put Conley to work if he had had any idea that the work would injure the ankle.

The evidence thus supports the submission of plaintiff's failure to report his ankle pain to his superiors, and supports also the hypothesization that plaintiff's failure to complain of his ankle pain contributed to cause the aggravation to the ankle injury.

For his final assault upon the contributory negligence submission, plaintiff says that Burlington North-

ern's defense was actually an assumption of risk defense —a defense which has been abolished in FELA cases, 45 U.S.C.A. § 54 (1986); Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L.Ed. 610 (1943) —which the railroad seeks to submit in the guise of contributory negligence. In a separate but related point, plaintiff charges trial court error in refusing an instruction offered by him which advised the jury that "(p)laintiff does not assume any of the risk of his employment", and which instructed them: "This matter is withdrawn from the case and you are not to consider such evidence in arriving at your verdict."

Plaintiff, for his position that the railroad was seeking by its contributory negligence instruction to foist off an assumption of risk defense, cites Taylor v. Burlington Northern Ry. Co., supra, a case cited by both parties for various propositions. In *Taylor,* the court held that an employee's failure to "bid off" the section gang he worked on, and thereby escape a hostile and abusive supervisor, was assumption by the employee of the risk (of emotional injury from such supervisor's hostility, abuse and harassment) and not contributory negligence. The trial court was held not to be in error in excluding the railroad's intended testimony on the subject. Said the court at 787 F.2d at 1316-17:

> Here the employee simply reported to work under the person assigned; and though the supervisor was known to have a hostile disregard for the employee, it was not such an extraordinary situation that the employee is chargeable for refusing to demand other terms and conditions of supervision. His acts did not constitute contributory negligence under the FELA. Reporting to work or facing the risks in-

herent in one's job is the essence of assumption of risk. . .

We are unable to see that plaintiff's hypothesized conduct in the case before us, i.e., his failure to report the pain in his ankle, could be seen in any way as constituting assumption of risk. A more apt description of plaintiff's conduct is found in that case at 787 F.2d at 1316: "Contributory negligence . . . is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist." Plaintiff's negligent failure to report his pain, if found by the jury, tended to add new dangers to the conditions of his employment. Plaintiff's conduct as hypothesized in the comparative fault instruction did not constitute assumption of risk.

We find no error in the submission of plaintiff's contributory negligence, nor in the refusal of the instruction withdrawing from the jury the issue of assumption of risk.

Judgment affirmed.

All concur.

Don W. Kennedy, C.J., P.J.